Supreme Court, U.S.
FILED

941314 JAN 31 1995

No. _____

OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term, 1994

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

Cross-Petitioners,

v.

JOINT SCHOOL DISTRICT NO. 241, BOARD OF TRUSTEES OF DISTRICT NO. 241; TRENT WOODS, Chairperson of said Board; AL ARNZEN, Superintendent,

Respondents,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May A School District Allow The Graduating Senior Class To Decide The Content Of High School Graduation Ceremonies, Including The Inclusion Or Exclusion Of Non-secular Material, Without Violating The Establishment Clause Of The United States Constitution?

2. Does The Inclusion Of Non-Secular Material In Graduation Ceremonies Represent Coercive State Action If Such Material Is Included Pursuant To A Vote Among Graduating Seniors And If The Graduation Program Contains A Disclaimer Informing Attendees That The School Board Neither Endorses Nor Opposes The Content Of The Graduation Ceremonies?

3. Does The First Amendment Permit Or Require Government Officials To Remove Religious Expression From The Speeches Of All Individuals Who Deliver An Address At A High School Graduation Ceremony Where Graduating Seniors, Without Direction From The School, Make All Decisions As To The Content Of The Ceremony?

LIST OF PARTIES

The Petition for Writ of Certiorari accurately lists the parties to this proceeding, except that Respondent Antoine Jesse Heath was inaccurately listed as Antoine Jessee Heath.

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CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

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Respondents,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.3 of the Rules of this Court, Citizens Preserving America's Heritage, Inc., *et al.* ("Cross-Petitioners"), file this Cross-Petition and respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in this case. This Cross-Petition is

unconditional and independent of the Petition for Writ of Certiorari (the "Petition") in that Cross-Petitioners pray that the writ be issued irrespective of whether the Petition is issued.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is reproduced in the appendix to the Petition at App. A. The opinion of the United States District Court for the District of Idaho is reported at 821 F. Supp. 638, and is reproduced in the appendix to the Petition at App. 2.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1994. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the first instance was obtained pursuant to 28 U.S.C. § 1343(3) in the District Court, and pursuant to 28 U.S.C. § 1291 in the Ninth Circuit Court of Appeals. Counsel for Cross-Petitioners first received the initial Petition for Writ of Certiorari on January 26, 1995.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petition correctly lists the statutory and constitutional provisions implicated in the Petition and this Cross-Petition.

STATEMENT OF THE CASE

The Petition accurately sets forth the statement of the case except that it erroneously states that the District Court "granted summary judgment in favor of Petitioners and Respondent Intervenors." Petition, at 8. The District Court granted summary judgment in favor of only Cross-Petitioners (Respondent-Intervenors), not in favor of Petitioners, who had not moved for

summary judgement. *See* App.*A, at 16.

Cross-Petitioners add that no one who attends a graduation ceremony in District No. 241 is ever asked to participate in any prayer during the graduation ceremony either by standing, bowing one's head, removing one's hat, or saying or doing anything.

In addition, Cross-Petitioners summarize the decisions in the courts below.

1. The District Court Decision

The District Court began its analysis with a discussion of the United States Supreme Court's decision in *Lee v. Weisman*. App. A, 4-7 (quoting extensively from *Lee*, 112 S. Ct. 2649 (1992)). The District Court quoted several passages from *Lee* wherein the Supreme Court stressed the "direct and complete" control exercised by the public school faculty and public school administrators over the graduation prayers at issue in *Lee*. The court noted that in *Lee*, a school official (the principal) determined that an invocation and a benediction should be given. The principal selected the clergyman who would deliver the prayer and supplied him with officially-approved guidelines for the prayer. According to the District Court in *Harris*, because of the pervasive involvement of government officials in the religious activities occurring at the commencement ceremony at issue in *Lee*, the *Lee* Court held that the graduation prayer violated the Establishment Clause.

The District Court in *Harris* held that the decision in *Lee* did not control the present dispute. App. A, at 6. In the graduation ceremony at Grangeville High School and at other high schools in District 241, unlike in the ceremony in *Lee*, the students were free to determine whether an invocation or benediction would be included in the ceremony, who would deliver any such message, and what the content of that message would be. App. A, at 13. Because the decision to include a religious

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* Unless otherwise indicated, all references to appendices refer to the appendices to the Petition.

message in the graduation ceremony was made by students, not the school, that decision was not governed by the Establishment Clause. *Id.* The District Court analogized to this Court's decision in *Board of Education of Westside Community School v. Mergens* for the operative principle:

> [T]here is a crucial difference between *government* speech endorsing religion which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

App. A, at 13 (quoting *Mergens*, 496 U.S. 226, 250 (1990)).

The District Court rejected the argument urged upon the court by the Respondents, Phyllis Wright Harris, *et al.* (the "Respondents"),that because the faculty and administrators supervised the graduation ceremony, the decision to pray during the graduation ceremony and the content of the prayer were somehow attributable to the state. App. A, at 13. The court also rejected the Respondents' argument that because the school district allowed students to vote on whether or not to include a prayer in the graduation ceremony, the state was somehow impermissibly "entangled" with religion. App. A, at 14.

Because the invocation and benediction that occurred at the graduation ceremony at Grangeville High School was the decision of the students, and not that of the school district or its employees, the District Court concluded that the religious expression did not violate the Establishment Clause.

2. The Court Of Appeals Decision

A majority of the Court of Appeals for the Ninth Circuit, over a dissenting opinion by Judge W. Wright, reversed the decision of the District Court. Judge Wiggins, writing for the

panel majority, held that because a student could avoid the religious message only at the cost of foregoing his or her graduation ceremony, the graduation prayer was coercive. App. B, at 28-29. In addition, the court held that the governmental involvement in the invocation and benediction was sufficiently pervasive to trigger the government's obligations under the Establishment Clause. App. B, at 21-22. For these two reasons, the majority concluded that the Establishment Clause was violated.

The majority held that the school ultimately controls the graduation ceremony. App. B, at 21. The majority reasoned that graduating seniors have authority to make decisions regarding the content of the graduation ceremony only because the school allows them to have it. In addition, the majority found significant the fact that the school district subsidized the graduation ceremony. *Id.* The school district offered to the graduating senior class the school facilities, at no cost, and incurred other expenses in connection with the ceremony. For these reasons, the majority concluded that the graduation ceremony was ultimately a school-controlled and school-sponsored event. Therefore, the students' decision to include an invocation or benediction in the graduation ceremony and the students' authority to prescribe their content properly were attributable to the school district. App. B, at 28.

The majority rejected the Petitioners' and Cross-Petitioners' argument that the invocation and benediction were student-initiated and therefore not restricted by the Establishment Clause. The majority reasoned that school officials could not divest themselves of constitutional obligations by permitting students to make decisions as to the content of any graduation speech. App. B, at 23. The majority distinguished this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel v. Center Moriches School District*, 113 S. Ct. 2141 (1993), and *Board of Education of Westside Community School*

v. Mergens, 496 U.S. 226 (1990). App. B, at 27. The majority noted that those cases involved open fora whereas this case, in contrast, did not involve an open forum because only speakers chosen by a majority of the senior class were permitted to speak at the graduation ceremony. The panel majority concluded that a forum that allows only selected speakers to convey a particular message without permitting others to speak is not open for purposes of First Amendment open-forum doctrine.

The majority also held that the school district's actions with respect to the graduation ceremony failed to advance a secular purpose and also had the primary effect of advancing religion and therefore violated the standards set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. B, at 29-31.

In dissent, Judge Wright held that the limited role of the school district in fashioning the content of the graduation ceremony caused the case to fall outside the rule articulated by the Supreme Court in *Lee*. App. B, at 33 (Wright, J., dissenting). Judge Wright concluded that based on the precedent of *Lee*, a school violates the Establishment Clause only when it exercises a high degree of control over graduation prayer which, in conjunction with the compelled nature of attendance at one's graduation ceremony, creates an unacceptable risk that students will be coerced to participate. App. B, at 35 (Wright, J., dissenting).

In reaching this conclusion, Judge Wright reasoned that prior Supreme Court precedents had established that custodial oversight and monitoring of religious meetings on school property did not make the religious activities that occurred in the meetings attributable to the state thereby implicating the Establishment Clause. App. B, at 35-35 (Wright, J., dissenting). Furthermore, because of the disclaimer printed in the commencement program and because the students were aware that any invocation or benediction delivered in connection with the commencement ceremony were the result of a majority vote of

the graduating seniors, all students and other graduation ceremony attendees would perceive that any religious expression included in the ceremony represented the preference of the students, and not that of the state. App. B, at 36 (Wright, J., dissenting). Accordingly there was no state imprimatur placed upon the delivery of any religious message. The school district merely accommodated the students' preference. Judge Wright therefore concluded that such accommodation did not endorse religious belief over disbelief, nor did it advance religion over non-religion. App. B, at 36-37 (Wright, J., dissenting). Rather, the school district's policy charted a neutral governmental course with respect to religion and demonstrated respect for the fundamental values of others. *Id.*

Judge Wright further urged the panel majority to follow the lead of the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), where the Court of Appeals for the Fifth Circuit reached a contrary ruling on similar facts. App. B, at 34 (Wright, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case presents primarily a conflict between two circuit courts of appeals over the proper construction of the Establishment Clause and the proper interpretation of this Court's decision in *Lee v. Weisman*. In addition, however, this case addresses even more difficult questions regarding the interrelationship between this Court's Establishment Clause jurisprudence, on the one hand, and this Court's Free Speech, Free Exercise and state action jurisprudence, on the other hand.

This Court has construed the Establishment Clause to forbid government endorsement of religion. This Court has also construed the Free Speech and Free Exercise clauses to bar government from using its coercive powers to interfere with an individual's profession and exercise of religion. In its Estab-

lishment Clause jurisprudence and also in other First Amendment contexts, this Court has held that government must remain neutral with regard to religion and religious speech.

As governmental entities, public schools must adhere to all of the mandates contained in the First Amendment. As the present controversy illustrates, schools often must navigate a very difficult course in honoring these constitutional safeguards. Public schools risk transgressing the Free Exercise and Free Speech provisions of the Constitution if they impose content-based and viewpoint-based restrictions on religious expression and target religious acts for unique prohibitions. The Establishment Clause, however, may require schools to impose such restrictions and prohibitions in certain situations. In the present context of student-initiated and student-directed invocations and benedictions included in public high school graduation ceremonies, the task of striking the balance among the First Amendment's clauses is especially difficult in light of the current conflicting case law.

In addition to reconciling the seemingly conflicting dictates of the Free Speech, Free Exercise, and Establishment Clauses, resolution of this present controversy may also have the effect of bringing the existing jurisprudence of graduation prayer into conformity with the definition of "state action" which this Court employs for purposes of the other constitutional principles under the Fourteenth Amendment.

Moreover, it is necessary for this Court to resolve this issue in order to avoid the further litigation that will now be necessary to define the lengths to which a school district must go to enforce against students and other private citizens who may speak at future commencement ceremonies the Ninth Circuit's ruling that school districts must not permit religious expression at graduation ceremonies.

1. There is a Conflict Among the Circuit Courts of Appeals and Among the District Courts

The decision below of the panel majority for the Ninth Circuit Court of Appeals conflicts with the unanimous decision of the Fifth Circuit Court of Appeals in *Jones v. Clear Creek Independent School District*, 997 F. 2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). The facts in *Jones*, in all material respects, are similar to those in this case.[1] No court or litigant has suggested that the facts of the cases are distinguishable or the holdings of the Fifth and Ninth Circuits reconcilable.

The Petition describes more fully the two conflicting methods of analysis adopted by the courts of appeals for determining whether student-initiated and student-directed invocations and benedictions at a high school graduation ceremony conform to the Constitution's Establishment Clause. In short, the Fifth Circuit interprets this Court's decision in *Lee* as forbidding invocations and benedictions in high school graduation ceremonies only when the government exercises some measure of control over either the decision that graduation prayer should be offered or the content of any graduation prayer. The Ninth Circuit majority in *Harris*, however, holds that with regard to invocations and benedictions at graduation ceremonies, it matters not who utters them or who decides that they shall be uttered or what the content of those utterances shall be. According to the Ninth Circuit, if an invocation or benediction is delivered by anyone, the school is responsible and, to the extent the school fails to police the graduation ceremony to remove any prayer or religious expression delivered by or at the instance of the

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[1] There are differences in the facts of the cases, but those differences weigh in favor of permitting the student-initiated invocation and benediction at issue in this case. The school officials in *Jones* had more control over the graduation ceremony than do the school officials in this case. Therefore, the case for attributing the religious expression to the government is more compelling in *Jones* than in *Harris*.

students, the school fails to discharge the affirmative obligations placed on it by the Constitution's Establishment Clause.

The conflict between the Fifth Circuit and the Ninth Circuit panel majority is not confined to only these two circuits. In an unreported decision, the Court of Appeals for the Third Circuit enjoined student-initiated prayer at a graduation ceremony on reasoning similar to that employed in *Harris*. *See American Civil Liberties Union of New Jersey v. Blackhorse Pike Regional Board of Education*, No. 93-5368 (3d Cir., June 25, 1993).[2] Earlier this month, the Court of Appeals for the Seventh Circuit ruled that an injunction prohibiting graduation prayer did not apply to student-initiated graduation prayer. *See Goluba v. School District of Ripon*, No. 94-2010, 1995 U.S. App. LEXIS 467 (7th Cir., Jan. 11, 1995).[3]

There also are contradictory decisions among the federal district courts. The District Court for the Middle District of Florida (which sits in the Eleventh Circuit), in a case involving student-initiated graduation prayer, followed *Jones*. *See Adler v. Duval City School Board,* 851 F. Supp. 446 (1994). The District Court for the Eastern District of Virginia (which sits in the Fourth Circuit), in a case that pre-dates the Ninth Circuit's decision in *Harris*, followed the approach subsequently employed in *Harris*. *See Gearon v. Loudoun County School Board*, 844 F. Supp. 1097 (1993).

The attorneys general of the states, who are charged with the responsibility of advising their constituent school districts,

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[2] The Order is attached in the appendix to the Cross-Petition at App. 1. This Court, on order of Justice Souter acting as Circuit Judge, denied the school board's application for review and let the injunction stand. *Blackhorse Pike Regional Board of Education v. ACLU of New Jersey*, Application No. A-92-974 (3d Cir., June 28, 1993) (no opinion issued).

[3] Although the court ostensibly was interpreting the terms of a civil injunction, and not the Establishment Clause, the court nonetheless stated that the Establishment Clause jurisprudence would inform its understanding of the injunction. *Goluba*, at 6.

are also divided on the permissibility of student-initiated and student-directed prayer and other religious speech at high school graduation ceremonies. Specifically, the attorneys general of the states of Maryland,[4] Tennessee,[5] and Kansas[6] have interpreted this Court's decision in *Lee* to foreclose student-led prayer in its formal graduation ceremonies. Conversely, the attorney general of the State of Kentucky[7] has issued an opinion stating that, according to the precedent of *Lee*, some form of religious observance at a public school graduation ceremony is permissible, and so long as such observances are student-initiated and student-directed, they would not violate the Establishment Clause. Although divided on this issue, the attorneys general in these states are united in their dismay at the confusion in this area of the law.

The Fifth and Ninth Circuits have thus reached opposite conclusions about the constitutionality of student-initiated and student-directed invocations and benedictions included in public school commencement exercises. The Ninth Circuit Court of Appeals was itself in sharp disagreement about the constitutional analysis applicable in the public school graduation ceremonial context and about whether any form of prayer or religious expression in that setting — however much the school district distanced itself from the decision to include such expression in that ceremony — can survive when scrutinized under the appropriate First Amendment test. These incompatible views of the commands of the First Amendment have also been adopted

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4 93 Op. Att'y Gen. 050 (1993), 1993 Md. AG LEXIS 55 (December 3, 1993), at 16-20.

5 93 Op. Att'y Gen. 42 (1993), 1993 Tenn. AG LEXIS 42 (May 10, 1993).

6 93 Op. Att'y Gen. 42 (1993), 1993 Kan. AG LEXIS 70 (May 17, 1993).

7 *Prayer at School Graduation*, 93 Op. Att'y Gen. 55, 1994 Op. Atty Gen. Ky. LEXIS 84 (August 5, 1994).

in conflicting decisions of the federal district courts and in the opinions of the state attorneys general. Each view claims to find its support in this Court's decision in *Lee v. Weisman*.

2. Failure to Resolve the Conflict Among the Courts is Contrary to the Public Policy

Although this Court has recognized and articulated that it is possible for school districts to accommodate student religious speech without violating the Establishment Clause, there continues to be wide-spread confusion among school officials as to what constitutes protected expression and what constitutes forbidden expression. This confusion seems to be most pronounced in the context of student-initiated and student-directed high school graduation benedictions and invocations. This unresolved controversy among the courts is contrary to the public policy in that it interferes with proper school government and imposes unreasonable costs upon local school systems.

Predictably, the lack of a clear statement by the Supreme Court concerning student-initiated religious expression at public school graduation ceremonies and the conflict among the court decisions have created an environment ripe for intimidation and threats of legal action against financially distressed school districts. School boards, facing tight budgets, crowded classrooms, and inadequate textbooks, are increasingly unwilling to commit district funds to a defense of students' religious rights and instead simply yield to the threats of lawsuits from one side or the other. The decision in such a case is not, therefore, one reached through a discussion on the merits by the elected local policy makers in the affected school district; it is rather a decision that is imposed by partisans who use the financial burdens of the litigation process to coerce a decision.

Even a flat prohibition against religious speech and exercise no longer is a fiscally safe position for school districts. Several school districts have been sued under the First Amend-

ment for barring the practice of student-initiated prayer.[8] Moreover, in response to this Court's decision in *Lee v. Weisman*, and out of concern that schools might opt for a safe "no-prayer" policy for all public school events, a number of state legislatures have passed laws protecting the right of students to engage in student-initiated prayer and religious speech at school functions including graduation ceremonies.[9] The effect of such statutes is to create a cause of action when school officials decide to police graduation ceremonies to remove any student-initiated graduation prayer or expression.

State agencies and school officials are trapped in the middle of this dispute, not wishing to tread on students' religious freedoms, but finding insufficient guidance in the conflicting case law. Local school districts are forced to spend considerable amounts of time, energy and scarce taxpayers' dollars defending themselves on all fronts, regardless of which position they take in the public school graduation prayer conflict. Failure to address the issue at this time will result in continuation of litigation in several states, initiation of litigation in others, and

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[8] *School Gets Around Court's Ban on Prayer*, Wash. Times, at A1 (May 22, 1993) (reporting students' suit against an Indiana school district for banning prayer at graduation).

[9] *See e.g.*, Tenn. Pub. Acts 534, § 1(c), *amending* Tenn. Code Ann. § 49-6-1004 (1993); Ark. Stat. Ann. § 6-21-202(3) (1993); Miss. Code Ann. § 37-13-4 (1993); *see also* David E. Anderson, *"Pomp and Circumstance," Prayer Debates, Lawsuits*, St. Petersburg Times, at 10 (July 11, 1994):

> Since th[e Supreme Court's] ruling [in Lee], there has been a flurry of federal court lawsuits, actions in half-a-dozen state legislatures, and debates in other states and the District of Columbia. Six states — Georgia, Virginia, Mississippi, Alabama, Arkansas, and Tennessee — have approved bills on the subject . . . .

See also School Prayer Court Cases, Legislation, St. Petersburg Times, at 10 (June 11, 1994) (describing legislation pending in Florida, the District of Columbia, South Carolina, and Louisiana protecting student-initiated prayer in public school graduation ceremonies).

often a surrender by school officials to anyone who threatens litigation. Without a decisive resolution of the difficult First Amendment issues raised by religious expression at public high school ceremonies, the school systems and communities in our states will continue to be rent by disagreement over what the Constitution allows or prohibits, and financially hard-pressed states will have to expend substantial sums re-litigating the same issues through the state and federal court systems.

This Petition presents a straightforward and timely opportunity for the Court to consider the important Establishment Clause questions raised by school graduation prayers and to provide clear direction to state and local school officials about whether, and if so how, to allow student-initiated religious expression at graduation and other public ceremonies. At present, the decisions and supporting rationale are so divergent that there is no uniform standard upon which school districts and boards of education can confidently make choices, or upon which the states can offer counsel to their agencies and political subdivisions. Thus, the need for a clear determination is paramount. A decision by this Court would lay this divisive controversy to rest and prevent further diversion of resources into litigation and away from appropriate academic matters.

3. The Decision Below is in Conflict with this Court's State Action Precedents

This Court has never framed its analysis in Establishment Clause cases in terms of whether there was the requisite state action to make the clause applicable to the offending conduct. Rather, the Court has implicitly collapsed its state action analysis into its analysis of what conduct the Establishment Clause proscribes.[10] However, it was essentially a state action theory

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[10] *See* Laurence Tribe, *American Constitutional Law* § 18–7, at 1720 n.29 (1988).

upon which numerous important Establishment Clause cases turned.[11]

This case presents an opportunity to reconcile this Court's graduation prayer Establishment Clause decisions and its state action decisions. In this respect, this present dispute regarding the permissibility of student-initiated invocations and benedictions at graduation ceremonies has an analogue in this Court's sectarian school funding decisions. For decades, this Court's sectarian school funding decisions were in conflict. Within the last decade, however, in a line of decisions which includes *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), this Court has substantially ameliorated that confusion. The rule articulated in *Zobrest* and *Witters* is that aid to sectarian education is permissible so long as the aid is provided under religiously neutral funding criteria. This rule, however, is simply an alternative formulation of a state action

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[11] *See Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2467 (1993) ("Because the [government-funded education entitlement program] creates no financial incentive for parents to choose a sectarian school, a [government-paid sign-language] interpreter's presence there can not be attributed to *state decision making*.") (emphasis added); *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) ("The government involvement with the religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986) ("[T]he fact that aid goes to the individuals means that *the decision to support religious education is made by the individual, not the state*.") (emphasis added); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 & n.15 (1987) (Title VII's exemption for religious organizations upheld notwithstanding that exemption facilitated religious organizations' efforts at furthering religion because the government itself had not advanced the organizations' religious mission); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (invalidating New York law requiring school prayer "because [the] prayer was composed by governmental officials as part of a governmental program to further religious beliefs").

test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals, not the state, the Establishment Clause is not implicated. *Zobrest*, at 467; *Witters*, at 487.

The same analytic approach could be applied to the religious speech in public fora cases. The Establishment Clause is not abridged so long as no religious criterion is employed in granting access to the fora.[12] But this also is simply an alternative formulation of a state action test. So long as the grant or denial of access to the forum is not based on religious criteria, the decision to use the forum for religious purposes is made by one or more private individuals, not the state.

Cross-Petitioners submit that a state action approach is appropriate in the context of prayer and religious speech at school assemblies. In fact, the Ninth Circuit majority employed a state action analysis (albeit an erroneous analysis) in concluding that school officials could not absolve themselves of their constitutional duty by delegating their responsibilities to a non-governmental entity. *See Harris*, App. B, at 23-24. The majority cited several of this Court's state action decisions for this proposition. Notably, the most recent state action decision relied upon by the *Harris* majority was *Evans v. Newton*, 382 U.S. 296, 299 (1966). This Court's state action jurisprudence has undergone substantial change since *Evans*. More recent decisions from this Court go the other way.[13]

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[12] *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226 (1989); *Widmar v. Vincent*, 454 U.S. 263 (1981).

[13] *See, e.g., San Francisco Arts and Athletics v. U.S.O.C.*, 483 U.S. 522 (1987) (no state action where plaintiff failed to show how government exerted influence over private actor's decision to enforce trademark rights in discriminatory manner); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (state is not responsible for private decision unless it establishes the criteria for those decisions or coerces or encourages the specific conduct complained of); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (employment decisions of

Although all of these more recent cases support the same principle, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), will illustrate its application. In *Jackson*, an electric utility had a monopoly in its locality and its rates and service policies were extensively regulated by the state. Nonetheless, this Court rejected a plaintiff's claim that the Due Process Clause protected her from having her electric service discontinued for nonpayment without notice and fair hearing. This Court held that the conduct of the utility did not constitute state action because there was an insufficient relationship between the challenged actions of the utility and the state. 419 U.S. at 357-59. Constitutional limitations on government were therefore inapplicable.

According to *Jackson* and other cases, mere acquiescence by the state in private individuals' conduct does not constitute state action. The government must actively encourage or facilitate the private conduct, not merely tolerate it. This is true even where the state has the clear power to prevent the challenged private conduct, but chooses not to exercise that power. Where the state involvement with the private actor has nothing to do with the private acts being challenged, those private acts will not be governed by constitutional limits placed on government.

There are, accordingly, strong indications that this Court now embraces a state action jurisprudence whereby the Court will not find sufficient state action to implicate the relevant constitutional provision unless the act in question (in this case

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private schools receiving government grants are not state action where they are not compelled or influenced by any state regulation); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (no state action and therefore no due process obligation on private utility company's termination of service where government regulations neither commanded, sanctioned, nor encouraged the termination practice); *cf. NCAA v. Tarkanian*, 488 U.S. 179 (1988) (no state action and therefore no constitutional requirement of due process where private organization demanded suspension of public university's athletic coach and university acquiesced therein).

religious expression or exercise) is traceable to a government rule or decision. This examination is performed at the decision-making level at which a government actor is responsible for its formulation. If no government actor imposes a rule or makes a decision which possesses constitutionally forbidden characteristics, the conduct or decisions of any private individuals do not implicate the Constitution simply because the government permits that which it could not engage in itself.

In this case, the decision to include religious speech in the commencement ceremony was made by the students, not school officials. Although the students' decision was permitted by the school, it was not encouraged or coerced by the school. The majority in the decision below erred, therefore, in concluding that the invocation and benediction were school-sponsored and school-controlled. The court committed a similar error in holding that merely because the school subsidized the graduation ceremony and school officials attended the ceremony, the school was constitutionally responsible for the acts and decisions of the students which the school permitted. Neither does the fact that the graduation invocation and benediction advanced religion and were undertaken with a religious motive implicate the test articulated in *Lemon v. Kurtzman*. It may be that all prayer is undertaken to advance religion but, in this case (unlike in *Lee*), the religious acts and motives are not those of the government.

The fact that the audience at the graduation ceremony was in some sense captive is also irrelevant. The Establishment Clause does not prevent private individuals from engaging in religious acts and expression even if the audience is captive. Government cannot engage in religious acts and expression even if the audience is not captive.[14] What is important is not

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[14] *But see Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (government employment of military chaplain does not violate the Establishment Clause because government has plenary control over military personnel movement and chaplains are necessary for soldiers to continue practicing their religion).

where the religious exercise is performed, or where the religious idea is expressed, but who performs or directs the performance of that act and who expresses or directs the expression of that idea.

The Establishment Clause limits the power of government to promote or engage in religious activity. Where the impetus for religious activity is purely of private initiative and design, however, there is no state action and the Establishment Clause does not proscribe the conduct. This is true even if there is government assistance so long as the criteria for receiving that assistance are neutral with respect to religion.

4. The Decision Below Conflicts with Numerous Decisions of this Court Construing the Free Speech Clause of the First Amendment.

The panel majority for the Ninth Circuit erred in concluding that this Court's Free Speech precedents were inapplicable to this dispute. The court reasoned that the school, by hosting the graduation ceremony and delegating to students virtually complete control over the content of the ceremony, did not create an open forum.[15] App. B, at 26-28. The court concluded that

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[15] Had the court below upheld the student-initiated invocation and benediction, it would have been unnecessary for the court to conclude that the school had created an open forum. Even if the First Amendment does not protect students from censorship of their graduation speeches, the school district nonetheless might decline to censor speakers at the graduation ceremony in consideration of First Amendment principles. There is no obligation on school officials to censor student expression to the full extent permitted by the First Amendment.

The converse is not true, however. If the graduation ceremony is an open forum or a limited public forum (or, as explained *infra*, even a non-public forum), then school officials cannot prohibit student-initiated religious expression. This Court has repeatedly held that when public school students engage in religious expression, the Establishment Clause does not prevail over the Free Speech Clause and authorize the suppression of such expression. *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Board of Education*

the graduation ceremony was not an open forum because only certain selected individuals (those whom the students chose) addressed the audience. App. B, at 27. However, under well-settled law, a public forum may be created for use only by certain speakers, and the fact that the government discriminates among speakers does not defeat the claim that a public forum has been created and thereby open the door to viewpoint-based speech restrictions. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47-48 (1983).

Assuming for purposes of argument that District 241 did not create either an open or limited public forum at its high school graduation ceremonies, a rule prohibiting student-initiated religious expression,[16] and only religious expression, would still contravene this Court's Free Speech precedents. Even in non-public fora, government is prohibited from regulating expression based on viewpoint.[17] In *Lamb's Chapel v.*

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of Westside Community School v. Mergens, 496 U.S. 226, 247 (1989); *cf. Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (justifying prior decision of Supreme Court upholding government loan of textbooks to sectarian school students against Establishment Clause challenge on the ground that countervailing Free Exercise Clause concerns warranted such a result).

[16] It has been suggested by one commentator that there is a distinction between verbal acts of worship, such as prayer, and religious expression. Comment, *Student-Initiated Religious Expression*, U. Chi. L. Rev. 1565, 1583-84 (1994). This distinction was suggested by Justice White in his dissent in *Widmar v. Vincent*, 454 U.S. 263, 283-84 & n.2 (1981) (White, J., dissenting). This Court explicitly rejected that view, labelling it novel, unintelligible, and unprincipled. *Id.* at 269 n.6. Justice White's view articulated in *Widmar* has not resurfaced in any subsequent decisions. Although he was the sole dissenter in *Widmar*, Justice White wrote for a unanimous Court in striking down similar restrictions on religious expression on public school property in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993).

[17] *Int'l Soc. for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Cornelius*, 473 U.S. at 800, 806 (both cases quoting *Perry*, 460 U.S. at 45).

Center Moriches Union Free School District, 113 S. Ct. 2141 (1993), this Court held that a school district violated the Free Speech Clause of the First Amendment by denying a religious group access to public school premises solely because the group intended to use the building to show a film that dealt with an otherwise permissible subject from a religious perspective. The Court held that speech restrictions that target religious expression discriminate based not only on subject matter (which in some types of fora might be permissible) but also on viewpoint (which is impermissible regardless of the type of fora). 113 S. Ct. at 2147. This Court rejected the argument that the restriction was viewpoint-neutral because all religions and all religious uses were treated alike. *Id.*

The Ninth Circuit decision below also cannot be reconciled with this Court's decision in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker* involved two high school students and a junior high school student who were suspended from school because they refused to remove black arm bands worn to protest the Vietnam War. This Court held that school officials could not restrict student-initiated expressive conduct unless the expressive conduct could be shown to undermine the discipline of the school or collided with the rights of other students to be secure and let alone. *Id.* at 508.

In this case, the Ninth Circuit dismissed the students' Free Speech and Free Exercise claims because (1) students were free to worship outside the graduation ceremony, App. B, at 32; (2) only a very limited number of students could address the audience and, thus, the forum was closed for many students, App. B, at 27; (3) the ceremony was not entirely voluntary, App. B, at 27; (4) school officials participated in the graduation ceremony by attending and presenting diplomas, App. B, at 27-28; and (5) the protections of the Free Speech Clause are "inapposite" when in conflict with the proscriptions of the Establishment Clause, App. B, at 32.

The arguments accepted by the Ninth Circuit for dismissing the students' Free Speech claims were rejected by this Court in *Tinker*. It was no defense that the plaintiffs in *Tinker* could have protested the Vietnam War before and after school. Neither can it be plausibly argued that the fora created by Grangeville High School or the other high schools of District 241 are less open than was the classroom in *Tinker*. Presumably, teachers at the high school and junior high school in *Tinker* exercised far more control over student expression than was exercised by the Grangeville High School officials at the graduation ceremony. Classmates of the *Tinker* plaintiffs were no less "captive" than were those who attended the Grangeville High School commencement exercises. In *Tinker*, objecting students could (and in fact did) express their disagreement at appropriate times and in appropriate manners, but they were expected to "endure" the message that their peers sought to communicate by wearing the black arm bands. Finally, apart from *Tinker*, this Court has in other cases refused to construe the Establishment Clause to authorize government to censor student-initiated religious expression. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 247 (1989); *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). The abstract risk of an Establishment Clause violation is precisely the type of vague and ill-defined fear that the *Tinker* Court held was insufficient to justify abridgement of students' Free Speech rights. *Tinker*, at 513-14.

The Ninth Circuit further erred in focusing on the fact that the decision to include an invocation and benediction in the graduation ceremony was reached by majority vote of the students. App B, at 22-23, 27. It is perhaps an arguable question whether a public high school can delegate to one or more students all decisions regarding the content of the school's annual graduation ceremony without simultaneously limiting that delegation with religious content restrictions. But it would

seem irrelevant, once that delegation is effected, what process the students undertake to arrive at these decisions. Justice Souter, in a concurring opinion in *Lee v. Weisman* joined by Justices Stevens and O'Connor, wrote:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

Lee, 112 S. Ct. 2649, 2678 n.8 (Souter, J., concurring). If, as these three members of this Court have suggested, it is permissible for a valedictorian to include a religious message in his or her valediction, it is hard to see how such a unilateral dictate is constitutionally preferable to a similar decision arrived at by majority vote of all graduating students.

The Ninth Circuit apparently misapplied Justice Jackson's immortal language in *West Virginia State Board of Education v. Barnette*:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts .... One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943), *quoted in Harris*, App. B, at 22-23. This Court's decision in *Barnette* will not support the position taken by Respondents and accepted by the Ninth Circuit. *Barnette* was not an Establishment Clause case; it was a Free Speech case. *Barnette* held that school officials could not compel students to salute the flag and recite the Pledge of Allegiance (which includes the phrase "one Nation under God").

The *Barnette* decision certainly did not stop other school children from reciting the Pledge, and West Virginia school children continue to recite the Pledge each day. The Barnette children merely were excused from reciting the Pledge. Arguably, they also could have been excused from the classroom so as to avoid hearing others recite the Pledge. But to the extent objectors elect to remain in the classroom while their classmates recite the Pledge, these objectors can be expected to maintain "respectful silence." The *Barnette* decision, therefore, is best understood not as forbidding exposure to an objectionable creed while in public school, but as forbidding only one method of state-directed indoctrination — compulsory verbal affirmation. The Ninth Circuit erred in concluding that this Court's decisions in *Barnette* and *Lee* protect students from exposure to the religious creeds of their classmates expressed at public school ceremonies.

5. The Decision Below Undermines the Purposes of the First Amendment

The Ninth Circuit's majority opinion creates a new and portentous rule: a school district may allow graduating seniors to decide the content of their graduating ceremony, but it must "take back its permission in part" so as to forbid any religious expression. App. B, at 32-33.

Neither the court below nor the any of the litigants in this case have suggested that had the students selected a graduation speaker and directed him or her to express political, economic, scientific, or philosophical ideas or theories, those ideas would inexorably bear the government's imprimatur. No one suggests that a school district endorses everything uttered at its commencement ceremonies. According to the Ninth Circuit's reasoning, expression which is unendorsed and uncoercive if secular, is endorsed and coercive if religious — even where the school district exercises no control over the content of graduation speeches and affirmatively disclaims any endorsement.

The decision of the Ninth Circuit majority is portentous for what it says about religious expression — that it does not merit the same First Amendment protection as other expression merits. It is portentous for what it requires the school district to do — to examine the content of graduation speeches, to determine the religious significance of various portions of the speeches, and to eliminate any portions that a court might subsequently determine to be religious, and thereby to entangle itself deeply in the religious expression of its students. It is portentous for its remonstrance of those who would communicate religious ideas, that they "must respect the constitutional rights of others" and refrain from such communication, *see* App. B, at 33, but no one need be concerned about respecting *their* constitutional rights of expression. It is portentous for its equating a school district's decision *not to censor* student-initiated religious speech at a graduation ceremony with *government establishment* of religion.

Despite the Ninth Circuit's confidence that the District Court "will have little difficulty fashioning a remedy," *see* App. B, at 32, this issue and this litigation cannot end here. The Ninth Circuit brushed aside the questions brought to its attention regarding the extent to which the Establishment Clause requires school districts to police graduation speeches to remove objectionable religious references. Must all graduation speeches receive prior review and approval? Can there be no extemporaneous graduation speeches? Is it sufficient for schools simply to announce that religious speech is impermissible? What are school officials required to do if the valedictorian or other graduation speaker defies the prohibition, departs from the approved text, and expresses impermissible religious ideas?[18]

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[18] *See ACLU Sued Over Graduation Prayer*, PR Newswire (June 8, 1993) (describing one Tennessee high school's graduation ceremony where the students spontaneously recited, en masse, *The Lord's Prayer*).

No party to this litigation has suggested that the school district somehow encouraged or compelled graduating seniors to utter religious ideas or words. There is, therefore, no need to restrain the school district from advancing or endorsing religion. From the beginning, this case has been about how to extend the Establishment Clause to suppress the religious expression of private citizens. That has been accomplished by the Ninth Circuit in the decision below.

CONCLUSION

For the foregoing reasons, Cross-Petitioners respectfully request that this Cross-Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted and the case set for plenary review.

Respectfully submitted,

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January 31, 1995

A UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5368

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ETC., *et al.*

v.

BLACKHORSE PIKE REGIONAL BOARD OF EDUCATION, *et al.*
ACLU-NJ and Edward Ross,

Appellants

(DNJ (Camden)) D.C. Civil No. 93-02651 (JI);

PRESENT: STAPLETON AND NYGAARD,
Circuit Judges

ORDER

It appearing to the court, based on the facts accepted by the district court as the basis of its decision, that:

(1) the graduation ceremony is a school sponsored event; the fact that the school board has chosen to delegate the decision regarding one segment of the ceremony to the members of the graduating class does not alter that sponsorship, does not diminish the effect of a prayer on students who do not share the same or any religious perspective, and does not serve to distinguish, in any material way, the facts of this case from the facts of *Lee v. Weisman*, 112 S. Ct. 2649 (1992);

(2) in light of *Lee v. Weisman*, *supra*, the appellants are likely to prevail;

(3) the appellants will suffer irreparable harm if an injunction pending appeal is not granted, *Kirod v. Burn*, 427 U.S. 347 (1976);

(4) the issuance of an injunction pending appeal will not occasion injury to the appellees or to the public sufficient to outweigh the irreparable injury that will occur to appellants if that relief is not granted;

Now, therefore, IT IS ORDERED that until further order of this court, appellees, their agents and employees, and all those voting in concert with them are hereby enjoined from conducting a school sponsored graduation ceremony that includes a prayer whether it be an invocation, a benediction or a prayer in any other form.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated: June 25, 1993

Nos. 94-1268 & 94-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOINT SCHOOL DISTRICT NO. 241, *et al.*,

Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., *et al.*,

Cross-Petitioners,

—v.—

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her child SAMUEL HARRIS.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether public school officials, who must and do retain a high degree of control over the precise contents of a school commencement program, can authorize students to transform this government program into a religious service without thereby violating the Establishment Clause.

2. Whether a government program in which only one religious group is allowed to speak can be considered a public forum.

3. Whether the Free Speech Clause authorizes a religious group to use a government program for proselytizing, even though this clearly violates the Establishment Clause.

LIST OF PARTIES

Phyllis Wright Harris filed this case, as her complaint states, "on her own behalf and on behalf of her three minor children, Beverly, Billy, and Samuel Harris." At the time of filing, all three children were students in the defendant school district. However, Beverly has since graduated from high school and Billy no longer matriculates in this school district. The only remaining student with standing to pursue this case is Samuel Harris, and Samuel graduates on June 2, 1995.

The caption used by the Harrises on this brief in opposition reflects the current status of the parties. For some unexplained reason, petitioners and cross-petitioners have deleted Billy from their captions, but not Beverly.

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Respondents submit this brief in opposition to the petition and cross-petition for *certiorari* in Nos. 94-1268 and 94-1314.

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical facts are omitted, and some statements are erroneous. A more accurate statement follows.

1. This case was filed on April 12, 1991, by Phyllis Wright Harris on behalf of herself and her three children, Beverly, Billy, and Samuel Harris. Beverly graduated in 1991 from Grangeville High School; Billy no longer attends school in this district; and Samuel, a senior this year, graduates on June 2, 1995. Thus, after that date, none of the Harris children will any longer be a student in petitioners' school district.[1]

2. Beverly Harris was a senior at Grangeville High School when this case was filed in 1991. School officials permitted Beverly's class to vote on whether religious practices would be inserted into the school's upcoming commencement ceremony. Beverly's class opted to insert two prayers and one religious hymn into the program. On Beverly's behalf, a preliminary injunction was sought in district court to halt these religious activities, but the court denied the injunction. Beverly, therefore, had no choice but to endure religious practices in order to participate in one of

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[1] According to cross-petitioners, this case presents a "timely opportunity" to decide certain First Amendment issues. Cross-Pet. at 14. Given Samuel's graduation date, this is not necessarily true. Indeed, under this Court's decision in *Weinstein v. Bradford*, 423 U.S. 147 (1979), it would appear that this case may well become moot when Samuel graduates.

the most important events of her life.[2]

3. This Court has held that "teachers and principals must and do retain a high degree of control over the precise contents of the [graduation] program." *Lee v. Weisman*, 505 U.S. __, 112 S.Ct. 2649, 2660 (1992). It is therefore significant that the school district in this case concedes that it "allow[s] the students to dictate the content of graduation," and that "[n]o implied restrictions are placed on the graduating seniors" in this regard. Pet. at 6. The principal of Grangeville High School testified that, under the school district's written policy, students are authorized to transform the *school's* graduation program into "a religious service." CR 51 at 112.[3] The superintendent of schools, who wrote this policy, testified that the policy authorizes students to dictate the content of these ceremonies, "no matter how religious they are." CR 50 at 58.

4. As the court below noted, the public school underwrites these commencement programs with taxpayer funds, providing "the building, chairs, platform for speakers, sound system, secretarial help, and janitorial staff," and also defrays the cost of the written Program in which the prayers and hymns are listed. Pet.App. B-21, B-19. Thus, the most important facts are not in dispute: Children are allowed, by a simple majority vote, to transform a government program into a religious service (containing as much denominational dogma as they wish); paid for by government funds; sponsored by the school district; in which school officials participate, and over which these officials have ultimate control.

5. The prayers that were given during Beverly's cere-

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[2] Petitioners state that "Mrs. Harris' oldest child [Beverly] left Grangeville High before graduating." Pet. at 7-8. This is erroneous.

[3] The designation "CR" refers to the clerk's record in the district court.

mony[4] were Christian prayers. They invoked Jesus and the Holy Spirit. They used the word "Lord" 15 times. CR 48 at 7. The religious hymn that also was inserted into Beverly's graduation program contained such messages as "We want You to find us living what is true. Lord, remind us who we are in You." No evidence was introduced in the district court indicating that this hymn had anything other than a religious purpose and effect.

6. In support of her motion for a preliminary injunction in 1991, Beverly testified: "I feel like school officials are telling me that I am not as good as the other students. I also feel as if I am being pressured to conform, and to accept someone else's version of what is an acceptable religious belief." Beverly also testified that, when she voiced her opposition to these religious activities during the school's voting process, she was retaliated against by other students. "Now I am being treated like an outcast." CR 1(F).

7. Petitioners state that Grangeville's 1990 senior class (when Beverly was a junior) "declined to include any non-secular music, prayer or speech" in the school graduation program. Pet. at 7. This is erroneous. As the written Program records, this event contained an invocation delivered *by clergy* and students sang a "Musical Benediction." CR 48, p. 8, No. 10.

8. Cross-petitioners (the student-intervenors) claim that "no one who attends a graduation ceremony in District No. 241 is ever asked to participate in any prayer during the graduation ceremony." Cross-Pet. at 3. This statement is

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[4] The only hearing held in this case occurred in 1991. Accordingly, the facts adduced at this hearing constitute the record. All parties concede that the religious activities that occurred during Beverly's ceremony are illustrative of the religious activities authorized by the school district's policy.

misleading. Remaining respectfully silent during prayer is conventionally viewed as "signif[ying] . . . participation or approval of it." *Lee v. Weisman*, 112 S.Ct. at 2658. In this sense, Beverly was not only asked to -- she was compelled to -- participate in two prayers and a religious hymn at her graduation. Similarly, Samuel's classmates have voted to compel him to participate in religious activities this June 2. Any notion that these children were not asked to participate in religious activities "is formalistic in the extreme." *Id.* at 2659.

9. Cross-petitioners claim that the Grangeville High School graduation ceremony is a public forum. The record refutes this claim. It is undisputed that a religious majority dictates the ceremony's content and monopolizes the podium. Only one view is heard, and all others are barred. Pet.App. B-27. Therefore, this is not a public forum. Even the school district does not contend that its graduation ceremony is a public forum.

REASONS FOR DENYING THE WRIT

Public school students have no independent right to dictate the content of a *school's* commencement program. No one in this case disputes that fact. *See Lee v. Weisman*, 112 S.Ct. at 2660 (school officials "must and do retain a high degree of control over the precise contents of the [graduation] program").[5]

Without abdicating its ultimate authority, the Grangeville school district has nonetheless allowed students to "dictate" the school's graduation program. Students have even been delegated the authority to transform the school's pro-

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[5] *Cf. Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986)("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board").

gram into a religious service. Armed with this power, Grangeville students have fashioned graduation programs that would make the activity in *Lee v. Weisman* appear sterile. These programs have included denominational, clergy-delivered prayers; denominational prayers offered by students; and religious hymns -- sometimes all in the same program.

The Ninth Circuit was clearly correct in declaring this scheme unconstitutional. There is no reason for this Court to review this decision.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE

Petitioners and cross-petitioners contend that the decision of the Ninth Circuit in *Harris* conflicts with the Fifth Circuit's decision in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (1992), *cert. denied*, 113 S.Ct. 2950 (1993). However, these decisions are significantly distinguishable. True, both cases involve the broad question of school sponsorship of student-initiated prayer in school commencement exercises. But the actual issue in *Jones* was the facial validity of a school policy that permitted high school seniors to deliver "nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Id.* at 964, 969 n.10. In upholding this policy, the court admonished that the plaintiffs could seek further relief if this policy were violated. *Id.* at 969 n.10.

In sharp contrast, *Harris* considered a policy that allows high school seniors to inject all of the following religious activities into the school ceremony: (1) as many denominational, proselytizing prayers as the students wish, (2) all delivered by clergy, and (3) an unlimited number of religious hymns and other religious messages. As petitioners con-

cede, the Grangeville policy "does not attempt to insure non-sectarian or non-proselytizing content" of the school's graduation program, and there are "[n]o implied restrictions" on the amount of religious content it can contain. Pet. at 5. In fact, the school district "allow[s] the students to dictate the content of graduation." *Id.* at 6. There is nothing in *Jones* suggesting that the Fifth Circuit would -- or that any court would -- sustain a policy such as this. In any event, *Jones* did not consider such a policy.

II. THE DECISION BELOW IS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

A. Petitioners' Policy Violates The Establishment Clause

Petitioners' policy contains an inherent constitutional flaw. It rests on an erroneous concept: that a government activity ceases to be a government activity when a religious majority is allowed to control it. The framers of the Constitution chose a different path for our nation. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Hundreds of activities long recognized as unconstitutional would be officially sanctioned under Grangeville's scheme. All that government officials need do is bind themselves to the outcome of a vote. If the majority then votes to usurp the government activity for a private religious purpose, the government would be obligated to finance and sponsor it. In the school context, majorities could vote to begin every class with prayer, and vote to post the Ten Commandments in every classroom. Indeed, this same prin-

ciple would permit each agency of government to allow constituents to insert their own religious activities into every government program.

The prayers (and other religious activities) inserted by students into Grangeville's official graduation program constitute state action in every relevant sense. They are advertised on the state's Program, included as an integral part of the government event, and are able to be offered from this podium only because the government has provided the financial and supervisory resources. Moreover, given that the government has the ultimate authority to prohibit these prayers from the official program, the decision to include them precludes any claim of government neutrality.[6] To paraphrase the Court's most recent state action decision: "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply [deferring to a majority vote]." *Lebron v. National Railroad Passenger Corp.*, 63 U.S.L.W. 4109, 4116 (Feb. 21, 1995).

Petitioners contend that a school district can somehow "remain neutral [while] allow[ing] the students to dictate the content of graduation." Pet. at 6. This cannot be true. Every time children dictate the insertion of religious activity into a school program, the school loses its neutrality. It is not the prayers, of course, that violate the Constitution; it is their placement into an official government program. *Compare Engel v. Vitale*, 370 U.S. 421 (1962), with *Board of Education v. Mergens*, 496 U.S. 226 (1990).

Students at Grangeville High who desire it are free to organize a private, religious baccalaureate service before or after graduation. But, contrary to petitioners' assertion,

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[6] Thus, cases such as *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), are patently inapposite.

school officials violate their constitutional obligation of neutrality when they allow prayers to be included in the government program. "The Constitution mandates that the government remain secular, rather than affiliating itself with religious beliefs or institutions . . . ." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 610 (1989). *See also Abington School District v. Schempp*, 374 U.S. 203, 226 (1947)("In the relationship between man and religion, the State is firmly committed to a position of neutrality").

Government neutrality is particularly important in the public school. "'[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 493 U.S. 907, 104 (1968), quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also Edwards v. Aguillard*, 482 U.S. 578, 583 (1987)("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause" in public schools).

Petitioners' religious activities -- and these prayers *are* the school district's -- violate the Establishment Clause. The fact that students initiate them does not change the fact that they are being offered as part of the government's own program, thereby forfeiting government neutrality. Church and state have been joined.

B. The Free Speech And Free Exercise Claims Raised In This Case By Cross-Petitioners Have Been Repeatedly Rejected By This Court And Were Properly Rejected By The Court Of Appeals

Petitioners make no Free Speech or Free Exercise argument, but cross-petitioners do. Cross-petitioners contend that, even if these religious activities otherwise constitute

Establishment Clause violations, they are saved by the free speech and free exercise rights of the students who want these prayers included in the school program.

This argument is wrong on the facts and wrong on the law. It is wrong on the facts because cross-petitioners are not merely seeking the right to engage in private religious expression. They are demanding that the state promote, sponsor and finance that religious expression by including it in an official school program. It is also wrong on the law. As this Court pointedly noted in *Abington School District v. Schempp*, 374 U.S. at 226, "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the state to practice its beliefs" (emphasis in original).

Cross-petitioners' only response to this well-established law is to argue that a tension exists in this case between their individual rights and the Establishment Clause. But a similar tension exists in *all* Establishment Clause cases. By definition, the Establishment Clause restricts a certain manner of expression: namely, religious expression sponsored by the state. Free speech stops at this wall. Simply put, there is no right to compel a violation of the Establishment Clause. *See Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973)(citations omitted):

> [T]his Court repeatedly has recognized that tension inevitably exists between the Free Exercise and Establishment Clauses . . . . As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.

See also West Virginia Board of Education v. Barnette, 319 U.S. at 638; *Lee v. Weisman*, 112 S.Ct. at 2657-58, 2660.

Cross-petitioners either ignore or fail to grasp the distinction between private religious speech and state-sponsored religious activity. Thus, they claim: "Where the impetus for religious activity is purely of private initiative and design . . . there is no state action and the Establishment Clause does not proscribe the conduct." Cross-Pet. at 19.

The flaw in that reasoning is apparent. A majority can initiate and design religious practices, but it cannot use the machinery of the state to promote them. Prayers (and other religious practices) inserted into a public school graduation program cross the line from private speech to public ritual.[7] The notion that publicly sponsored prayers become constitutional whenever the majority wants them is to say, in effect, that our constitutional safeguards, including the Establishment Clause, can be overruled by majority vote. That is not the premise of the Constitution and it has never been this Court's view.

Cross-petitioners make a similarly flawed argument when they contend that the disclaimer that appears on the written graduation Program somehow cleanses the constitutional violation occurring on the podium. However, this argument too has been consistently rejected by the Court, which has properly recognized that no amount of disclaim-

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[7] Cross-petitioners make the same fundamental error in relying on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in support of their free speech claim as when they rely on *Board of Education v. Mergens*, 496 U.S. 226, in the context of free exercise. In both *Tinker* and *Mergens*, schools were constitutionally obligated to tolerate certain student speech on a nondiscriminatory basis. Nothing in those cases support what the students want to do here: compel the school to sponsor and finance their religious activity and include it in the school's own program. Indeed, *Tinker* and *Mergens* illustrate what Grangeville's response to this request should be.

ing "can blind us" to a clear Establishment Clause violation. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

Finally, cross-petitioners argue that Grangeville's graduation ceremonies are public fora and, consequently, the students' religious practices cannot be subjected to "viewpoint-based speech restrictions." Cross-Pet. at 20. There is no basis in fact for claiming that this podium is a public forum. Indeed, the school district itself eschews the notion that it has created a public forum, given the responsibility the district would then have to open it to unfettered discourse.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Neither by word nor deed has Grangeville opened its graduation podium to unlimited discourse. Public discourse does not occur. The only speech permitted is the religous majority's speech. As the Ninth Circuit correctly noted, "[n]o matter what message a minority of students may wish to convey, the graduation forum is closed to them." Pet.App. at B-27. This critical fact is not in dispute, and this fact precludes the graduation ceremony from being considered a public forum.

CONCLUSION

An undercurrent in the petition and cross-petition is that barring students from having the option to include religious activities in school programs is inimical to religion. On the contrary, the Establishment Clause is designed to safeguard religion from government (at the same time it safeguards government from religious strife). "[A] union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. at 431. Students who today vote to insert prayer can tomorrow vote to denigrate prayer, and the strife that is likely to erupt in the school (and in the community) is precisely what the Establishment Clause intends to prevent.

The decision below is a faithful application of a fundamental principle. Accordingly, respondents respectfully request that this Court deny the petition and cross-petition for *certiorari*.

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Dated: February 24, 1995

(3)

Supreme Court, U.S.
FILED
APR 5 1995
OFFICE OF THE CLERK

No. 94-1314

IN THE

Supreme Court of the United States

October Term, 1994

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., *et al.*,

Cross-Petitioners,

v.

JOINT SCHOOL DISTRICT NO. 241, *et. al.*, and PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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42 U.S.C. § 1983 1,4,5

Pursuant to Rule 15.6 of the Rules of this Court, Citizens Preserving America's Heritage, Inc., *et al.* (Cross-Petitioners) file this Reply to Respondent's Brief in Opposition to address the issue raised in the Brief in Opposition that this case may soon become moot. That issue was not addressed in the Petition or Cross-Petition.

The Harris Child's Graduation Will Not Render This Case Moot

Respondent-Harris suggests, in a footnote to the Brief in Opposition, that because Respondent's youngest child, Samuel Harris, will soon graduate from Grangeville High School, this case may soon become moot. Brief in Opposition at 1 n.1. On the contrary, the graduation of Respondent's child from high school will not moot this case for the following reasons:

(1) This case involves religious expression at a public facility, not in the classroom, and enrollment in school is not necessary for standing.

(2) Harris sued as a taxpayer, and her standing as a taxpayer is unaffected by her child's graduation; and

(3) Harris prevailed on motion for summary judgment in a suit under 42 U.S.C. § 1983 and, if the decision of the Ninth Circuit Court of Appeals is not reversed, Harris is entitled to prospective permanent injunctive as well as monetary relief.

Accordingly, all of the parties have a continuing stake in the outcome of this litigation that will survive the graduation of the Harris child.

1. This Case Involves Religious Expression at a Public Facility, not in the Classroom, and Enrollment in School is not Necessary for Standing.

This case involves prayer and religious expression at a public high school graduation ceremony, not prayer and religious expression in the classroom. The ceremony is open to the public. The relevant standing inquiry in this case is similar to

that in any "public facility" case — whether the plaintiffs use the facility and suffer actual injury.

Directly on point is the recent decision of the Sixth Circuit in *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), *petition for cert. filed* February 15, 1995 (No. 94-1383). *Washegesic* involved an injunction issued by a district court requiring the removal of a portrait of Jesus Christ that had been hanging in the hallway of a public secondary school. After the injunction was issued, and while the case was on appeal, the plaintiff graduated. 33 F.3d at 681. In rejecting the defendant-school district's claim that the case was moot, the Court of Appeals for the Sixth Circuit held that the plaintiff's status as a student was not necessary to confer standing in the case. 33F.3d at 381-83. The court reasoned that the student might still visit the school after graduation to attend sporting events and other functions at the school. 33 F.3d at 682. Therefore, the student risked confronting the portrait whenever he passed through the hall.

Also directly on point is *Collins v. Chandler Unified School District*, 470 F. Supp. 959, *aff'd in part, rev'd in part*, 644 F. 2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), a case relied upon by the Ninth Circuit panel majority in this case. *Collins* involved a suit by a parent on her own behalf to enjoin a school district's practice of allowing students to include prayers at public assemblies. The district court held that the parent had standing because the parent was a resident within the boundaries of the school district. 470 F. Supp. at 960-61 & n.1. Numerous cases are in accord with *Collins* and *Washegesic*.[1]

[1] See, e.g., *Jager v. Douglas County School District*, 862 F.2d 824, 826 n.1 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (graduated student and father challenging prayer at high school football games permitted to "continue this suit . . . as people who attend football games); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985) (parents who relocated from school district continued to have standing to raise establishment clause challenge to religious meetings held on school premises during school hours and distribution of Bibles at school because parents continued to pay taxes in the school district); *ACLU v. Rabun County*, 698 F.2d 1098, 1108 (11th Cir. 1983) (Plaintiffs had standing to challenge

The rule articulated in *Washegesic* and *Collins* is applicable here. Harris and her children may, in the future, attend graduation ceremonies at Joint School District No. 241 schools, and risk exposure to prayer and religious expression at graduation ceremonies. Accordingly, Harris and her children continue to have standing to assert their Section 1983 claim after the children's graduation from the school.

Moreover, a ruling that this case is now moot would be inconsistent with the Fifth Circuit's decision and this Court's order in *Jones v. Clear Creek Independent School District (Jones II)*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), the Fifth Circuit's graduation prayer decision which is in conflict with the Ninth Circuit's decision below. In *Jones II*, students and parents sued to enjoin student-initiated graduation prayer. The case continued long after the graduation of the student-plaintiffs in *Jones v. Clear Creek Independent School District (Jones I)*, 930 F.2d 416 (5th Cir. 1991), *vacated and remanded*, 112 S. Ct. 3020 (1992) (vacating judgment and remanding for further consideration in light of *Lee v. Weisman*). But neither the Fifth Circuit in *Jones I* or *Jones II*, nor this Court, in remanding the case, suggested that the case was moot.

2. Harris Continues to Have Standing to Bring this Suit in her Capacity as a District Taxpayer.

Harris, in her initial complaint, sued not only on behalf of her children, but also "on her own behalf as a taxpayer to [the School] District," *see* Harris's Complaint at ¶ 2, and averred to be a taxpayer to Joint School District No. 241. *Id.* at ¶ 5. Harris

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cross displayed in Georgia state park because plaintiffs' use of park was "conditioned upon the acceptance of unwanted religious symbolism"); *Murray v. Austin*, 947 F.2d 147, 151 (5th Cir. 1991) *cert. denied*, 112 S. Ct. 3028 (1992) (citizen had standing based upon "exposure" to city insignia which contained cross); *Harvey v. Cobb County*, 811 F. Supp. 669, 674 (N. D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2138 (1994) (lawyer had standing to challenge Ten Commandments posted in courthouse); *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982) (municipal taxpayer had standing to challenge city's erection and display of nativity scene), *rev'd on other grounds*, 465 U.S. 668 (1984).

had taxpayer standing at the outset of this litigation and continues to have standing on that basis.

Harris sued under 42 U.S.C. § 1983 alleging that her rights under the Establishment Clause were violated by the school district's policy of allowing students to include prayer and religious expression in graduation ceremonies. At every stage of this litigation, Harris has claimed an economic injury by virtue of her taxpayer status:

> As the Court below noted, the public school underwrites these commencement programs with taxpayer funds, providing "the building, chairs, platform for speakers, sound system, secretarial help, and janitorial staff," and also defrays the cost of the written program in which prayers and hymns are listed. Children are allowed, by simple majority vote, to transform a government program into a religious service . . . paid for by government funds.

Respondent's Brief in Opposition at 2 (citing *Harris v. Joint School District No. 241*, WL651111 (No. 93-35839) (9th Cir., November 18, 1994). Appendix B to the Petition at B-21, B-19.

Moreover, a finding that Harris has taxpayer standing would be consistent with this Court's decision in *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Although the *Lee* Court did not find it necessary to rule upon the standing of Daniel Weisman (a taxpayer-plaintiff) to challenge the graduation prayer in that case, the language employed by this Court indicated that the constitutional wrong in *Lee* reached not only Deborah Weisman (a student) but also her parents:

> The school board (and the United States, which supports it as amicus curiae) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students *and parents* throughout this country who consider that due respect and acknowledgement for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life

> as a graduation. We assume this to be so in addressing the difficult case now us, for the significance of the prayers lies also at the heart of *Daniel and Deborah Weisman's* case.
>
> . . . .
>
> . . . Assuming, as we must, that the prayers were offensive to the students *and the parents* who now object, the intrusion was both real and, in the context of a secondary school, a violation of the *objectors'* rights. That the intrusion was in the course of promulgating religion that sought to be civic and nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the *objectors*. . . .
>
> . . . .
>
> . . . [The government's position] fails to acknowledge that what for many of Deborah's classmates *and their parents* was a spiritual imperative was for *Daniel and Deborah Weisman* religious conformance compelled by the State. . . .

Id. at 2653, 2659, 2660 (emphasis added).

Therefore, since the outset of this litigation, Harris had standing as a taxpayer to litigate this Establishment Clause claim and continues to have standing on that basis.

3. Under the Ninth Circuit's Decision, Harris's Rights to Injunctive and Monetary Relief are not Affected by her Child's Graduation.

Harris sued under 42 U.S.C. § 1983 and, on a motion for summary judgment, prevailed on appeal to the Ninth Circuit. In that motion, Harris demanded permanent injunctive relief not limited in duration to the period of time one or more of her children remained in school. While this matter was pending before the district court, Harris similarly sought an injunction not limited in time. *See* Harris's Application for Preliminary Injunction. To enforce the Ninth Circuit's decision, Harris will do what she has done before — seek an order from the district

court permanently enjoining the school district from allowing students to pray or express their faith during high school graduation ceremonies — an order that is neither limited in duration nor dependent upon whether the Harris child remains in public school. The injunction that Harris seeks would survive the Harris child's graduation.

Moreover, Harris's motion for preliminary injunctive relief was denied by the district court, and Beverly Harris attended a graduation ceremony where student-initiated graduation prayer and religious expression were included. *See* Respondent's Brief in Opposition at 1-2. Therefore, Harris has a present claim for damages under Section 1983 and may seek to recover those damages from the school district.[2]

In view of the prospect of an injunction granting permanent relief to Harris and restraining the school district, and the potential for compensatory and other damages, the parties have a continuing stake in this litigation.

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[2] Harris's complaint included a demand for preliminary and permanent injunctive relief but did not explicitly list compensatory damages in the relief requested. *See* Complaint at ¶ 11, *Harris v. Joint School District No. 241*, 821 F. Supp. 638 (D. Idaho 1994) (No. 91-0166-N-HLR). The complaint also included a demand for "additional and alternative relief as is just in the circumstances." In Harris's application for preliminary injunction, Harris alleged that money damages would not be adequate to compensate Respondent for the threatened violation of her and her children's rights. *See* Application for Preliminary Injunction at ¶ (5), *Harris*, 821 F. Supp 638. Harris never waived or disclaimed her right to receive monetary damages. Accordingly, compensatory damages are fairly included in the "alternative relief" demanded in the complaint and not precluded by the Ninth Circuit's ruling.

Conclusion

The graduation of Samuel Harris will not render this case moot and, for the reasons set forth in the Petition and Cross-Petition for writ of certiorari, the writ should be granted.

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